MASON HAYES & CURRAN

SUBMISSION FOR CLE ACCREDITATION

SESSION TITLE: COLLECTIVE REDRESS – WHERE WE ARE NOW

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PANELLISTS:

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TWO ADDITIONAL SPEAKERS TO BE CONFIRMED

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1 Session Overview

1.1 The Representative Actions Directive (EU) 2020/1828[1] (the **Directive**) entered into force on 20 December 2020. The Directive signifies an important development in consumer law. This is because it empowers approved bodies to bring representative actions on behalf of the collective interests of consumers, seeking injunctive relief and/or redress for trader infringements of specified Union law.

1.2 This is a significant reform, especially for companies operating in multiple Member States and particularly in jurisdictions such as Ireland, where options for collective, class, or group actions have traditionally been limited, costly, and time-consuming.

1.3 The Directive seeks to harmonise the framework for collective actions brought on behalf of EU consumers, ensuring a more consistent and accessible mechanism across Member States. At the same time, the Directive incorporates safeguards to discourage unfounded or frivolous claims against traders.

1.4 Under the Directive, designated Qualified Entities can bring proceedings before Member State Courts on behalf of groups of consumers alleging infringements of their rights by traders, whether the alleged infringement occurred domestically or in another EU Member State. Notably, the Directive has broad application, extending beyond general consumer protection to areas such as data protection, financial services, energy, and telecommunications.

1.5 As discussed in greater detail below, to distinguish the EU regime from the more litigious US class action procedure, the criteria required in the Directive to bring a redress action are relatively strict.

1.6 The Directive entered into application at national level on 20 June 2023. While several EU Member States were slow to transpose the Directive into their national law, all Member States, except for Luxembourg, now appear to have done so. In Ireland, for example, the Directive was transposed into national law by the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023[2], which came into force on 30 April 2024.

2 Key Themes for Discussion

2.1 Through an interactive panel format, including the use of a hypothetical case study, the panel will examine the new legal framework for collective actions under the Directive. As part of this examination, the panel will discuss the core concepts and key features of the Directive and highlight important practical considerations and what they will mean for economic operators.

2.2 In particular, the discussion will focus on the following topics:

- Qualified Entities
- Sectors
- Reliefs
- Safeguards
- Publication Requirements

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[1]Representative Actions Directive (EU) 2020/1828 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02020L1828-20241213

[2]Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 https://www.irishstatutebook.ie/eli/2023/act/22/section/8/enacted/en/html

3 Qualified Entities

3.1 Under the Directive, each EU Member State must designate at least one 'Qualified Entity' to bring actions on behalf of consumers for alleged breaches by traders of a wide range of EU Directives and Regulations.

3.2 A list of Qualified Entities is maintained by the European Commission. This consolidated list is facilitated on the European Commission's EC-REACT platform. This is one of a range of functions performed by the platform designed to support the coherent application of the Directive across the EU.

3.3 Member States must ensure that entities, particularly consumer organisations, including those representing members from multiple Member States, are eligible for designation as Qualified Entities for the purpose of bringing both domestic and cross-border representative actions.

3.4 To qualify for designation as a Qualified Entity to bring cross-border representative actions, the entity must comply with specified criteria, more particularly that:

(A) It is a legal entity established under the national law of the Member State where it seeks designation and can demonstrate at least 12 months of actual public activity in protecting consumer interests prior to applying for designation.

(B) Its statutory purpose clearly reflects a legitimate interest in safeguarding consumer rights.

(C) It is non-profit making in character.

(D) It has not been declared insolvent or subject to insolvency proceedings.

(E) It is independent and free from influence by any parties other than consumers, particularly traders, with an economic interest in the representative action. This includes situations involving third-party funding where permitted under national law. The entity must have procedures in place to prevent such influence and avoid conflicts of interest between itself, its funders, and the consumers it represents.

(F) It is transparent and makes publicly available information demonstrating its compliance with the designation criteria and information about the sources of its funding in general, its organisational, management and member structure, its statutory purpose and its activities.

3.5 Member States have discretion to determine the criteria they use to designate Qualified Entities for the purpose of bringing domestic representative actions. Member States may decide to apply the same designation criteria for Qualified Entities engaged in domestic representative actions as for cross-border representative actions. Irrespective of the approach adopted by Member States at a national level, the criteria must be consistent with the objectives of the Directive.

3.6 Member States must assess at least every five years whether Qualified Entities continue to comply with the designation criteria. Member States must revoke a Qualified Entity's designation status where it no longer complies with one or more of the designation criteria.

3.7 Member States must also investigate a Qualified Entity's designation where concerns are raised by a Member State or the Commission about whether it meets the designation criteria. Where appropriate, the designation must be revoked if the entity no longer meets

one or more of the required criteria. In a representative action, the defendant trader can also raise legitimate concerns with the court or relevant authority about the entity's compliance with those criteria.

4 Sectors

4.1 Qualified Entities are empowered to bring collective action cases on behalf of consumers for breaches of a wide range of EU legislation (listed in Annex I of the Directive). The net is cast wide to include several sectors such as technology, health and financial services.

4.2 For the product and consumer sectors these include:

- The General Product Safety Regulation[3]
- The Sale of Goods Directive[4]
- The GDPR[5]
- The Directive on Liability for Defective Products[6]
- The Medical Devices Regulations[7], and
- EU Regulations on Medicinal Products for Human Use[8]

5 Reliefs

5.1 A Qualified Entity may seek injunctive relief to stop or prevent a practice that infringes applicable EU law, and/or pursue redress measures, such as compensation, repair, replacement, price reduction, reimbursement, or contract termination, as available under national law.

5.2 The Directive affords Member States a discretion to introduce or maintain rules in their national law requiring a Qualified Entity to first consult with the trader before seeking an injunctive measure, with the aim of ending the alleged infringement. If the trader does not stop the infringement within two weeks of receiving the consultation request, the Qualified Entity may initiate a representative action for an injunction.

5.3 Notably, limitation periods are suspended while the injunction is being determined to preserve consumers' rights to proceed to redress.

5.4 In order for a Qualified Entity to seek injunctive relief, there is no requirement for individual consumers to expressly 'opt-in' to be represented by that Qualified Entity. Moreover, the Qualified Entity is not required to prove actual loss or damage by individual consumers affected by the infringement, or intent or negligence on the part of the trader.

5.5 Unlike applications for injunctive relief, the Directive does not require a Qualified Entity to engage with the trader before bringing a representative action for redress. This is without prejudice to any national level requirements such as the requirement under Irish law for solicitors to advise their clients to consider mediation before bringing an action.

5.6 Member States must establish rules on how and when individual consumers involved in a

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[3] Regulation (EU) 2023/988

[4] Sale of Goods Directive 2019/771 https://eur-lex.europa.eu/eli/dir/2019/771/oj

[5] General Data Protection Regulation 2016/679 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R0679-20160504

[6] Product Liability Directive 2024/2853 https://eur-lex.europa.eu/eli/dir/2024/2853/oj/eng

[7] Medical Device Regulation 2017/745 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02017R0745-20250110

[8] Directive 2001/83/EC relating to medicinal products for human use https://eur-lex.europa.eu/eli/dir/2001/83/oj/eng

representative action for redress can, within a set period, explicitly or tacitly indicate whether they wish to be represented by the Qualified Entity and be bound by the outcome. However, consumers who are not habitually resident in the Member State where the action is brought must explicitly 'opt-in' to be represented in order to be bound by the outcome.

5.7 Member States must establish rules to ensure that consumers who have explicitly or tacitly chosen to be represented in a representative action cannot be represented in another representative action, or bring an individual action, based on the same cause of action against the same trader. These rules must also prevent consumers from receiving compensation more than once for the same claim against the same trader.

6 Safeguards

6.1 An important feature of the Directive is the safeguards it has put in place, which are designed to ensure the system does not encourage frivolous lawsuits. These include:

(A) **Loser pays principle:** The costs of the proceedings must be borne by the unsuccessful party, in accordance with conditions and exceptions provided for in national law that are applicable to court proceedings in general. Typically, individual consumers involved in a representative action for redress are not liable for the costs of the proceedings. There is, however, provision for a partial costs order to be made against individual consumers if their intentional or negligent conduct results in a party incurring costs.

(B) **Dismissal of manifestly unfounded cases:** Courts can dismiss manifestly unfounded cases at the earliest possible stage of the proceedings in accordance with national law.

(C) **Settlement:** There is the possibility that a claim can be settled. However, such a settlement requires court approval.

(D) **Third-party funding:** Where third-party funding is permitted under the national law of a Member State, a Qualified Entity benefiting from such funding must publicly disclose the sources of funding for the representative actions it brings.

(E) **Multiple claims by individual consumers:** Member States must lay down rules preventing consumers from bringing an individual action or being involved in another collective action against the same trader for the same infringement. Furthermore, Member States must ensure that consumers do not receive compensation more than once for the same cause of action against the same trader.

7 Publication Requirements

7.1 Qualified Entities must publish details of all the representative actions they take. They must maintain a list on their website of all the actions they are involved in, the status of these actions, and the results of each concluded action.

7.2 When a national court decides a case or approves a redress settlement proposal from the parties to a representative action, the court must order the defendant trader to inform represented consumers of any final decision or approved settlement by means appropriate to the circumstances and within specified time limits. This includes, where relevant, informing all affected consumers individually. This obligation does not apply if the consumers are informed of the final decision or approved settlement through another

method.

8 Overarching Remarks

8.1 The Directive represents a profound change in the rights available to consumers to bring collective and cross-border actions in relation to a wide range of EU consumer protection legislation. In jurisdictions such as Ireland where, until now, there was no collective litigation framework, Qualified Entities are now empowered to bring claims against traders on behalf of consumers who may not otherwise engage in litigation, including in cross-border disputes.

8.2 The Directive gives consumers greater access to legal redress, creating greater liability exposure for companies in what was previously a patchy legislative landscape across the EU. Not only will companies be more exposed legally, but there will also be a greater reputational risk for companies in circumstances where Qualified Entities and traders must necessarily publish information about a court's decision in a representative action.

8.3 The Directive contains a number of safeguards to ensure the new regime does not encourage frivolous lawsuits. Nevertheless, the introduction of cross-border collective actions will be of particular concern to businesses with a presence in multiple Member States. This is because Qualified Entities may collaborate to initiate cross-border actions in Member States where third-party funding is permitted. Accordingly, it is envisaged that the Directive will inevitably lead to an increase in domestic and cross-border consumer litigation.

8.4 As a result, companies with an EU presence should assess these reforms and how they may affect their risk management, and litigation strategies moving forward.

9 Practical Value for Attendees

9.1 This session is intended to provide for a targeted discussion of the legal framework for collective redress under the Representative Actions Directive, as well as potential compliance strategies for affected stakeholders. It is intended to provide an overview of the key features of the Directive and to identify the key issues and challenges stakeholders face in adapting their practices to comply with the new regime. The session will offer practical insights into how best to prepare and adapt to these legislative developments.

9.2 The session will draw from a diverse set of legal experts, drawing on their experience in litigation and product liability, to ensure thought-provoking discourse. The panellists' individual perspectives will be informed by their jurisdiction, with panellists from Germany, Ireland, and the UK (to provide a post-Brexit perspective).

9.3 Through the use of a hypothetical case study, the speakers will engage the audience through an interactive discussion about the new collective redress regime under the Directive. They will also identify the key risks and challenges it presents to consumer-facing entities and offer their insights into the impact the Directive has had so far and where they see the collective redress landscape heading in the future. Q&A and further discussion will be encouraged.

9.4 Attendees will come away from this session with a greater and real-world understanding of the collective redress regime under the Directive. The session will provide for a discussion between our panel and the IADC community on the Directive and so, it will provide attendees an opportunity to express their views on these reforms and the future of

collective redress actions in a product liability context.

10 Learning Objectives and Takeaways

10.1 This panel offers legal professionals and corporate counsel a valuable chance to learn about the important changes in EU collective redress litigation.

10.2 Participants will:

(A) Understand the key legislative requirements under the Representative Actions Directive for collective redress, the broad differences from the previous position on collective redress or multi-plaintiff litigation in the EU, and what these reforms mean for stakeholders in terms of their legal obligations going forward.

(B) Understand the impact of the new developments under the Directive and the practical steps they can take to adapt to these changed requirements.

(C) Understand the relevant important considerations and insights traders, manufacturers and other relevant stakeholders must consider with respect to the impact of the new developments under the Directive and the practical steps they can take to adapt to these changed requirements.

(D) Understand a real-world perspective on the contemporary challenges faced by economic operators and other relevant stakeholders under the collective redress legislation and an assessment of how the Directive will fare in striking a balance between protecting the collective interests of consumers and providing appropriate safeguards to avoid abusive or frivolous litigation.

(E) Consider the role of litigation funding under the Directive and how this might interact with Member State national laws, such as Ireland's, which tightly limit or prohibit third-party litigation funding.

(F) Be engaged in a discussion around the efficacy of the legislative reform in this area.

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